STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 7, 2012

In the Matter of BRENT, Minors.

No. 298720
Wayne Circuit Court
Family Division
LC No. 10-492704

Before: SAAD, P.J., and STEPHENS and KRAUSE, JJ.

PER CURIAM.

Respondent N. Brent, the father of the minor children appeals as of right from an order asserting jurisdiction over the children pursuant to MCL 712A.2(b) in this child protective proceeding. The children's mother, respondent S. Brent, has filed a cross-appeal challenging the same order. We affirm.

I. FACTUAL BACKGROUND

Respondents' family came to the attention of Children's Protective Services (CPS) in January 2010, after CPS received a referral that respondents' oldest son had left the family home and contacted the police following an argument with respondents. Mia Wenk, a CPS investigator, interviewed respondents and the children in respondents' home. While Wenk apparently was satisfied that the incident did not require further inquiry, she was concerned about other conditions she observed in the home. Specifically, she observed holes in the plaster walls, mold, a lighting fixture with dangling wires, and water damage. Wenk also observed that respondents' youngest child, JB, who was then 11 years old, slept in an unfinished basement bedroom on a mattress on the concrete floor, with paint peeling from the cinderblock walls. In addition, JB had a severe speech impediment.

The following day, Wenk returned to respondents' home with her supervisor and an intern. The intern photographed the conditions in the home while Wenk and her supervisor discussed their concerns with respondents. In addition to the conditions observed the day before, the CPS investigators also noticed a gun cabinet containing shotguns without trigger locks and ammunition that was accessible to the children. The CPS investigators also learned that JB had been screened for lead poisoning and had a lead level above 10 mgb/dl, which was indicative of lead poisoning. Subsequently, CPS arranged for respondents to receive services from Families First to remedy these conditions. Respondents initially agreed to accept the services but then refused the services. Consequently, the Department of Human Services (DHS) filed a petition requesting that the trial court exercise jurisdiction over the children.

Respondents exercised their right to a jury trial to determine whether the children came within the court's jurisdiction. Following a trial in May 2010, a jury found that the children came within the court's jurisdiction. This appeal followed.[1]

II. RIGHT OF SELF-REPRESENTATION

Respondent N. Brent argues that the trial court erroneously denied his request for self-representation at the preliminary hearing. A trial court's decision on a request for self-representation is generally reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The right to self-representation correlates with the equally fundamental right to counsel. *People v Brooks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298299, issued August 16, 2011), lv pending, slip op at 7. Principles surrounding the right to the effective assistance of counsel in criminal proceedings apply by analogy to child protective proceedings. *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001). In the criminal context, the right to self-representation is guaranteed by the Sixth Amendment, the Michigan Constitution, and Michigan statute. *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L.Ed.2d 562 (1975); *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994); MCL 763.1.

In this case, N. Brent stated at the preliminary hearing that he intended to represent himself in the proceedings. The trial court failed to question him regarding this decision, and instead granted petitioner's request to appoint a standby attorney to assist N. Brent "at this time," i.e., at the preliminary hearing. N. Brent again asserted his intention to represent himself at an upcoming pretrial hearing; however, at the pretrial hearing, N. Brent appeared with retained counsel, who represented him at both the adjudicative jury trial and at the depositional hearings.

On this record, we cannot conclude that N. Brent's right to self-representation was violated. In *People v Hill*, 485 Mich 912, 912; 773 NW2d 257 (2009), our Supreme Court held that the trial court did not violate the defendant's right to self-representation where it denied the defendant's request "at this time" and it "did not foreclose the defendant's opportunity to raise the self-representation issue again after jury selection." The Supreme Court further noted that the defendant's original request "was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." *Id*. The circumstances surrounding N. Brent's early requests for self-representation are similar to those in *Hill*. The trial court appointed standby counsel early in the proceedings, noting that the decision was made "at this time." The trial court did not foreclose N. Brent from renewing his request later. Instead of renewing his request, N. Brent retained his own counsel. Under these

[1] In June 2010, the trial court returned the children to respondents' custody. In September 2010, the court terminated its jurisdiction over the children. Petitioner thereafter filed a motion to dismiss on the ground that this appeal was moot because the children were no longer subject to the trial court's jurisdiction, but this Court denied the motion. *In re Brent, Minors*, unpublished order of the Court of Appeals, entered November 30, 2010 (Docket No. 298720).

circumstances, N. Brent cannot now claim that his right to self-representation was violated. Compare *Hill*, 485 Mich at 912.

III. JUDICIAL MISCONDUCT AND BIAS

Respondents argue that the trial judge was bias and improperly pierced the veil of judicial impartiality at the jury trial. Because neither respondent moved to disqualify the trial court judge or raised any objection based on judicial misconduct, this issue is not preserved. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). We review unpreserved claims of error for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

A trial court has broad discretion in managing the conduct of a trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). A trial court properly may question a witness to clarify testimony or elicit additional relevant testimony. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996). The trial court may not, however, pierce the veil of judicial impartiality by engaging in conduct or making comments that might unduly influence the jury and deprive a party of his or her right to a fair and impartial trial. *Conley*, 270 Mich App at 307. Further, claims of judicial misconduct are reviewed to determine whether the court's conduct or comments evidenced partiality that could have influenced the jury to a party's prejudice. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

In *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009), this Court summarized the principles governing judicial disqualification on the grounds of judicial bias as follows:

> MCR 2.003(B)(1) provides that a judge is disqualified when the "judge is personally biased or prejudiced for or against a party or attorney." Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a "'deep-seated favoritism or antagonism that would make fair judgment impossible'" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted).

The record does not support respondents' claims that the trial court was biased. Respondents rely on several statements by the court but fail to present those statements in context. Viewed in context, the challenged statements are not indicative of any judicial bias. Respondents' reliance on adverse rulings by the court is likewise misplaced. The court's rulings do not reveal the "deep-seated favoritism or antagonism" necessary to establish actual bias. *In re Contempt of Henry*, 282 Mich App at 680.

Respondents also complain that the trial court improperly interfered with the examination of witnesses, particularly during the testimony of N. Brent, and improperly questioned witnesses in a manner that pierced the veil of judicial impartiality. The record discloses that the trial court properly exercised its discretion to manage the conduct of trial and properly questioned witnesses as necessary to clarify testimony or elicit additional relevant information. Further, most of the court's interjections during N. Brent's testimony were necessary because while testifying N. Brent became argumentative and repeatedly either failed to answer the questions that were asked or offered additional information that exceeded the scope of the questions. However, we note that, during this query, the court engaged in an exchange with N. Brent that could be viewed to have pierced the veil of judicial impartiality. Specifically, the court questioned N. Brent about a photograph and whether the photograph of the basement bedroom depicted a mattress on a bed frame, rather than on the floor. This exchange became somewhat argumentative and suggested that the court did not view N. Brent's testimony as credible. Nonetheless, any error in this questioning did not affect respondents' substantial rights. The brief questioning related to the court's disagreement with N. Brent's characterization of a photograph. Further, the photograph was admitted into evidence, thereby enabling the jury to reach its own conclusion about what it depicted. The jury was subsequently instructed to disregard any judicial conduct or comment that might seem to indicate an opinion as to the evidence. Given the brevity of the colloquy and the instructions, we cannot conclude that the court's conduct deprived respondents of a fair trial or unduly influenced the jury.

IV. EVIDENTIARY ISSUES

Respondents argue that the trial court committed several evidentiary errors that denied them a fair trial. We review preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Unpreserved claims of evidentiary error are reviewed for plain error affecting the aggrieved party's substantial rights. MRE 103(a)(1); *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007).

A. PETITIONER'S PHOTOGRAPHIC EVIDENCE

Respondents argue that the trial court erred in admitting photographs of their home that were taken by the CPS investigators during a follow-up visit on January 21, 2010. Respondents contend that the photographs were taken without their knowledge or consent in violation of their rights under the Fourth Amendment, and in violation of a criminal statute and petitioner's own internal policies. They also contend that the photographs were not relevant because they did not depict the condition of the home at the time the petition was filed.

Respondents did not raise a Fourth Amendment challenge below. Accordingly, our review of this issue is limited to any plain error affecting respondents' substantial rights. *Schumacher*, 276 Mich App at 180. Given respondents failure to raise a Fourth Amendment issue in an appropriate motion to suppress, no factual record pertaining to this issue was developed below. Without an appropriate record to review, we are unable to find a plain error. Further at trial, the CPS investigator testified that the photographs were taken with respondents' knowledge and without any objection by respondents. On this record, we cannot conclude that respondents' rights under the Fourth Amendment were violated.

Respondents also argue that the photographs were taken in violation of MCL 750.539d, which provides, in pertinent part:

> (1) Except as otherwise provided in this section, a person shall not do either of the following:
>
> (a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.
>
> (b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.

This is a criminal statute that prohibits unauthorized recordings and photographing in a private place. In this case, Wenk, her supervisor, and an intern investigated respondents' home. In the course of their investigation, the intern took several photographs of the home. First, we note that it is unclear whether the CPS investigators took these photographs without respondents' consent and thus in violation of MCL 750.539d. Second, even if the statute was violated, the statute does not prohibit the admission of the photographs into evidence. See *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003). Because the statute does not contain any exclusionary provision, suppression of the photographs was not required.

Respondents also argue that the photographs should have been suppressed because they were taken in violation of petitioner's own internal policies. In support of this argument, respondents cite the minutes of Governor's Task Force on Children's Justice. The minutes indicated that the Executive Committee discussed a plan to provide all CPS workers with digital cameras. The notes state,

> [A question was] asked about CPS's policies on taking photographs. CPS is encouraged to take photos as a way to document evidence/findings. CPS cannot take photographs of the home without the parent's permission.

Although this statement alludes to a policy against taking pictures of a home without a parent's consent, it does not identify the source of that alleged policy. Accordingly, we cannot determine whether petitioners alleged internal policy precludes photographs taken in violation of the policy from being used as evidence in child protective proceedings, and thus, this argument does not provide a basis for relief.

Respondents also argue that the photographs were not relevant to show the condition of the home on the date the petition was filed because they were taken approximately a month earlier. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010). Generally, relevant evidence is admissible, and irrelevant evidence is not admissible. MRE 402. The testimony established that the photographs were taken on January 21, 2010, approximately a month before the petition was filed. The record contains testimony that N.

Brent was unwilling to put money into repairing the house because he anticipated that it would be subject to condemnation proceedings. Further, the petition was filed because respondents declined an offer of services intended to remedy the conditions in the home evidenced by the photographs. Under these circumstances, the trial court did not abuse its discretion in determining that the photographs were probative of the condition of the home at the time the petition was filed.

We also reject respondents' argument that petitioner failed to establish an adequate foundation for the admission of the photographs because Wenk did not personally take the photographs. Wenk testified that she was present when the photographs were taken and that the photographs accurately depicted the conditions of the home as she observed them during her visit. The trial court did not abuse its discretion in finding that this testimony established a sufficient foundation for the admission of the photographs. *Katt*, 468 Mich at 278.

B. JB'S MEDICAL RECORDS

Although respondents contend that JB's prior medical records were unlawfully obtained, they stipulated to the admission of those records at trial. By affirmatively approving the admission of the evidence, they have waived any claim of error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

C. N. BRENT'S LEAD TESTING RESULTS

Respondents argue that the trial court erroneously excluded N. Brent's testimony regarding the results of his home lead level testing of JB. The trial court excluded the testimony because N. Brent did not provide appropriate "documentation." The basis for the court's ruling is not entirely clear. To the extent the court was concerned about the absence of a scientific basis establishing the reliability of the home testing, see e.g., MRE 702, we believe that the court erred in excluding the testimony because its purpose was not to present a scientific analysis of environmental contamination in the home. Rather, it was to show how respondents responded to concerns that their child had lead poisoning. Evidence that respondents conducted home lead level testing at the advice of the Department of Community Health was relevant to this issue. However, any error in excluding this evidence was harmless under MCR 2.613(A). Regardless of whether respondents conducted home lead level testing in 2005, the evidence showed that they failed to follow up on testing JB's lead levels. Additionally, the lead testing evidence was not relevant to the other significant issues in the case involving the conditions of the home. Therefore, we conclude that any error in excluding this evidence was harmless.

D. PHOTOGRAPHIC EVIDENCE OF RESPONDENTS' IMPROVEMENTS

Respondents also challenge the trial court's decision to exclude photographs depicting respondents' improvements to the home after their children were removed. We find no error. As this Court observed in *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004), the jurisdictional statute, MCL 712A.2, "speaks in the present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed." Unlike the photographs which were taken before the petition was filed and subsequently offered to prove the conditions of the home when it was filed, the rejected photographs depicted conditions and improvements

made after the children were removed from the home. Accordingly, these photographs were not probative of the children's "situation at the time the petition was filed." Therefore, the trial court did not abuse its discretion in excluding them on the ground that they were not relevant.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondents also argue that they did not receive the effective assistance of counsel. In analyzing a claim of ineffective assistance of counsel in a child protective proceeding, this Court applies by analogy principles of ineffective assistance of counsel developed in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Because respondents did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, respondents must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Respondents have the burden of demonstrating both deficient performance and prejudice. *People v Carbin*, 463 Mich App 590, 600; 623 NW2d 884 (2001).

Counsel has wide discretion in matters of trial strategy. *Odom*, 276 Mich App at 415. There is a strong presumption that counsel was effective with respect to matters of trial strategy, and this Court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *Id*. "Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id*.

Although respondents contend that counsel was ineffective for failing to call S. Brent, the children, and other witnesses, respondents have submitted neither an offer of proof indicating what testimony these witnesses would have provided nor is the substance of the witnesses' testimony apparent from the record. Accordingly, respondents have not satisfied their burden of establishing the factual predicate for this claim. *Carbin*, 463 Mich App at 600.

Respondents also argue that counsel was ineffective for failing to file an appropriate motion to suppress petitioner's photographs on the ground that they were improperly obtained. Even if the exclusionary rule like the ineffective assistance of counsel standard is applicable by analogy to child protective proceedings, respondents have not demonstrated that the either the evidence was improperly obtained or that suppression would have been the appropriate remedy. That is, respondents failed to show that counsel's failure to file a motion to suppress was deficient and that, but for counsel's alleged error, the result of the proceeding would have been different. Accordingly, this ineffective assistance of counsel claim cannot succeed.

Respondents next argue that counsel was ineffective for failing to move to disqualify the trial judge for bias. As previously discussed, the record does not support respondents' claims of

judicial bias, and therefore, we conclude that counsel was not ineffective for failing to file a motion for disqualification.

Respondents also argue that counsel was ineffective for failing to offer evidence of N. Brent's home lead level testing. The record discloses that counsel attempted to offer such evidence, but it was excluded by the trial court; therefore, counsel's performance with respect to this issue cannot be considered deficient. Furthermore, as previously discussed, any error by the court in excluding the lead level testing evidence was harmless and did not prejudice respondents. Under these circumstances, this ineffective assistance of counsel claim cannot succeed.

Respondents next argue that counsel improperly admitted that respondents neglected their children. We disagree. This claim is based on remarks made by counsel during opening statement and closing argument. Viewed in context, it is apparent that the primary purpose of the challenged statements was to criticize petitioner's decision to seek court intervention when the alleged problems could have been resolved through lesser means. Counsel emphasized that petitioner's failure to remove the children until 30 days after CPS began investigating showed that petitioner did not view the children as being at a risk of harm in the home. This was a strategic attempt to use petitioner's actions against petitioner. The fact that the strategy was not successful does not establish ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Similarly, respondents have not shown that counsel was ineffective for eliciting evidence that the family had a prior history with CPS. Counsel's decision to pursue this subject matter was a matter of trial strategy. Counsel's questioning was intended to show that, despite prior CPS involvement, there had never been a prior referral involving lead exposure. Further, the testimony disclosed that the prior CPS referrals were all unsubstantiated. Under these circumstances, respondents have not overcome the presumption that counsel's conduct was sound trial strategy. Respondents also contend that counsel erroneously stipulated that lead levels over 10 establish a medical finding of lead poisoning. However, the medical records support this characterization. Accordingly, counsel's stipulation was not inaccurate, and thus, counsel's performance was not deficient.

Next, respondents argue that counsel was ineffective for failing to request a separate jury verdict for each child or an instruction that the jury could find jurisdiction with respect to JB alone. This was clearly a matter of trial strategy. Although some of the alleged bases for jurisdiction concerned only JB, jurisdiction was also requested because the general disrepair of the home and the access to firearms affected all of the children. Further, counsel reasonably may have concluded that a request for separate jury verdicts may have increased the likelihood that at least one child would be found subject to the court's jurisdiction. Accordingly, respondents have failed to overcome the heavy burden that counsel's decision was a trial strategy.

Respondents lastly argue that counsel was not ineffective for failing to request an instruction indicating that petitioner had the burden of proving a statutory ground for jurisdiction by a preponderance of the evidence. To the extent that the trial court's instruction can be considered erroneous for failure to specify which party has the burden of proof, we conclude that respondents were not prejudiced by counsel's failure to object. The court did not suggest that

respondents had any burden of proof, and the court's instructions made it clear that the court has jurisdiction only if the jury "find[s] by a preponderance of the evidence that one or more of the [s]tatutory grounds have been proven." It is not reasonably probable that the failure to request an instruction clarifying that petitioner bore the burden of proof affected the outcome of the verdict.

For these reasons, respondents have not demonstrated that they were deprived of the effective assistance of counsel.

VI. STATUTORY GROUNDS FOR JURISDICTION

Respondents also argue that the evidence at trial was insufficient to establish a statutory basis for jurisdiction. We disagree.

A statutory basis for jurisdiction must be established by a preponderance of the evidence. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). In reviewing the sufficiency of the evidence in a jury trial, the evidence must be viewed in a light most favorable to petitioner and "this Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

Jurisdiction in child protective proceedings is governed by MCL 712A.2(b), which provides, in pertinent part:

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this sub-subdivision:
>
> (A) "Education" means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.
>
> (B) "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

There was sufficient evidence to establish, by a preponderance of the evidence, that the home or environment was an unfit place for the children to live in. Petitioner offered evidence that JB slept in a basement bedroom with bare cinderblock walls and peeling paint. The room was not insulated and the basement window was too small to permit escape in case of a fire. Other areas of the house had substantial water damage and disintegrating plaster. Petitioner was willing to refrain from removing the children if respondents were accepted services to improve the adverse conditions, but respondents rejected those services. The evidence also showed that the children had access to unsecured firearms. Although there was no evidence that respondents' possession of the firearms was illegal, there was evidence that respondents did not take adequate measures to prevent the children from accessing the firearms. Despite respondents' confidence that the children would not attempt to do so, a reasonable trier of fact could find that the children's access to the unsecured weapons created a serious risk of harm.

In sum, the evidence was sufficient to enable the jury, by a preponderance of the evidence, to find a statutory ground for jurisdiction was established.

VII. INDIAN CHILD WELFARE ACT (BOTH RESPONDENTS)

Respondents both argue that the trial court violated their rights under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., which "provides specific procedures and standards that apply where states are involved in removing Indian children from their families." *In re TM*, 245 Mich App 181, 186; 628 NW2d 570 (2001). The ICWA's notice provision provides, in pertinent part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [29 USC 1912(a).]

"Once notice is provided to the appropriate tribe, it is for the tribe to decide if the minor child qualifies as an 'Indian child.'" *In re TM*, 245 Mich App at 187. See also MCR 3.961(B)(5) (requiring petitioner to indicate in the petition whether the child is a member or eligible for membership in an Indian tribe).

The record reveals that petitioner investigated N. Brent's claim that his uncle was an "Alleganian Indian" by notifying the Bureau of Indian Affairs. Petitioner received a response from the United States Department of the Interior Bureau of Indian Affairs stating that "there is not a federally recognized Alleganian tribe." On appeal, respondents argue that petitioner should have understood that the Allegany Indian Reservation is not a tribe, but a reservation occupied by Seneca and Cayuga Indians, however there is no indication that respondents conveyed this information to petitioner. Regardless, this issue is now moot. An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy. *Kieta v*

Thomas M Cooley Law Sch, 290 Mich App 144, 147; 799 NW2d 579 (2010). The remedy for a violation of the ICWA would be to remand to the trial court "for the purpose of providing proper notice to any interested Indian tribe pursuant to the ICWA." See *In re IEM*, 233 Mich App 438, 456; 592 NW2d 751 (1999). The trial court has already terminated its jurisdiction over the children. Because the trial court no longer has jurisdiction, there is no longer any party seeking either foster care placement or termination of parental rights. 25 USCA 1912(a). The remedy of transferring proceedings to a tribe unless the tribe declines jurisdiction, 25 USCA 1911(b), is no longer necessary because the proceedings have been concluded.

VIII. MISCELLANEOUS DUE PROCESS ISSUES

Both respondents argue that the procedures below violated their right to due process. A claim that a trial court allowed unfair procedures in violation of a party's constitutional right to due process is reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, ___ Mich App ___; ___ NW2d ___ (Docket No. 303211, issued October 18, 2011), slip op at 11.

Parents have a fundamental interest in the companionship, custody, care, and management of their children, which is an element of liberty protected by due process. *In re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009); see also *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *Hunter v Hunter*, 484 Mich 247, 269; 771 NW2d 694 (2009). The essential elements of procedural due process are "adequate notice, an opportunity to be heard, and a fair and impartial tribunal." *Hughes v Almena Twp*, 284 Mich App 50, 69; 771 NW2d 453 (2009).

Respondents present a laundry list of grievances within this issue, mostly pertaining to their belief that petitioner launched a fishing expedition to build a case against them after the initial referral was unsubstantiated, and that petitioner unjustifiably sought jurisdiction over the children to punish respondents for their rejection of unnecessary services. However, respondents were afforded the procedural protections provided by the statutes and court rules, including their right to a jury determination of the existence of a statutory ground for jurisdiction. We have rejected respondents' claims of error pertaining to the fairness of that trial. Accordingly, we reject respondents' contention that they were not afforded due process.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause